IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

ANDREW YOUNG, Administrator of
the Estate of DAVID G. YOUNG, and
ANDREW YOUNG, individually,

Plaintiffs/Appellants,

v.

Petition No. 33872
From the Circuit Court of
Berkeley County, West Virginia
Civil Action No. 06-C-923

PAMELA SUE MCINTYRE, formerly known as
PAMELA SUE YOUNG and THE HUNTINGTON
NATIONAL BANK,

Defendants/Appellees.

APPELLANT'S BRIEF

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Plaintiffs/Appellants

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PETITION FOR APPEAL

I. RULINGS FROM WHICH APPEAL IS TAKEN

This appeal is taken by Plaintiffs/Appellants Andrew Young, Administrator of the Estate of David G. Young, and Andrew Young, individually (the Plaintiffs below) from the Order of the Circuit Court of Berkeley County, entered April 16, 2007, and entitled "Order Granting Defendant Pamela Sue McIntyre's Motion for Summary Judgment and Denying Plaintiffs Cross Motion for Summary Judgment." The Final Order was made in response to the Motion for Summary Judgment made by the Defendant Pamela Sue McIntyre and Cross-Motion for Summary Judgment filed by the Plaintiffs Andrew Young, Administrator of the Estate of David G. Young, and Andrew Young, individually.

II. STATEMENT OF THE NATURE OF THE CASE

Plaintiff Andrew Young is the sole heir at law of David G. Young and further qualified as the Administrator of the Estate of David G. Young, who are seeking by civil action a Judgment quieting Plaintiff's title to a one-half undivided interest in the subject property.

III. STATEMENT OF FACTS

1. The Plaintiff, Andrew Young, is the Administrator of the Estate of David G. Young, who died intestate in Berkeley County, West Virginian on or about July 31, 2006.

2. The said Andrew R. Young qualified as the administrator of the estate on or about August 7, 2006.

3. By deed dated June 13, 1983, David G. Young was conveyed the subject property situate in Arden District of Berkeley County, West Virginia, and more particularly described as:

> Lot No. 18 of Meadows of Arden, containing 4.612 acres, as shown on a plat and survey thereof dated August 11, 1978, made by William J. Teach, LLS, recorded in the Office of the Clerk of the County Commission of Berkeley County, West Virginia, in Plat Cabinet No. 1, Slide 27, to which plat reference is hereby made for a metes and bounds description of the real estate ....

By Clarence E. Martin, III, Trustee, said deed recorded in the office of the Clerk of the County Commission of Berkeley County, West Virginia, in Deed Book 369, at page 553.

4. The Defendant, Pamela Sue McIntyre, and David G. Young were married in Washington County, Maryland, on June 30, 1982.

5. By deed dated October 2, 1987, David G. Young and Pamela Sue Young, husband and wife, were conveyed the subject property as joint tenants with the rights of survivorship by David G. Young and Pamela Sue Young, husband and wife, by deed of record in said Clerk's office in Deed Book 423, at page 625.

6. On or about January 27, 2005, David G. Young filed a Verified Complaint in the Family Court of Berkeley County, West Virginia, for divorce and said action was titled "David G. Young, Plaintiff, v. Pamela Sue Young, Defendant, Case No. 05-D-86."

7. That pursuant to the filing of the complaint for divorce, the parties executed a property settlement agreement dated October 24, 2005, where in part the parties agreed in ¶2 that:

> "The parties will continue to own the former marital domicile and shall list the property for sale in the spring of 2006. That Husband will continue to exclusively live in the house and pay the mortgage debts on same. The parties agree to split the cost of repairs to sell the house up to $5,000 each. When the house sells, the parties will split the net proceeds equally."

8. That by Final Divorce Order dated November 8, 2005, the Property Settlement Agreement was incorporated therein and was enforceable by either party against the other through contempt powers.

9. David G. Young subsequent to the entry of the Final Divorce Order had exclusive possession of the subject property to the exclusion of Pamela Sue McIntyre.

10. The property was not sold prior to the death of David G. Young.

IV. PROCEEDINGS BELOW

Plaintiffs filed their Complaint against the Defendants on or about December 12, 2006, requesting a judgment quieting Plaintiff's title to a one-half undivided interest in the subject property.

On or about February 22, 2007, Ms. Pamela Sue McIntyre filed a Notice of Bona Fide Defense.

On or about March 6, 2007, Ms. Pamela Sue McIntyre filed a Motion for Summary Judgment.

On or about March 23, 2007, the Plaintiffs filed a Cross Motion for Summary Judgment. After responsive memoranda had been filed by the parties, the Circuit entered an Order on April 16, 2007 granting the Defendant's Motion for Summary Judgment and Denying the Plaintiffs' Motion for Summary Judgment.

V. STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo.* Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755, syl. pt. 1, (1994). Further, "questions of law and statutory interpretations are subject to a *de novo* review." Burnside v. Burnside, 194 W. Va. 263, 460 S.E.2d 264, syl. pt. 1 (1995). *See*, Belt v. Rutledge, 175 W. Va. 28, 330 S.E.2d 837 (1985) ("[i]f the question on review is one purely of law, no deference is given and the standard of judicial review by the courts is *de novo.*") "Although factual findings are reviewed under the clearly erroneous standard, mixed questions of law and fact that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles are reviewed *de novo.*" *Burnside*, 460 S.E.2d at 265.

VI. ASSIGNMENTS OF ERROR

1. The lower court erred in holding that the plain language of the final order in the divorce of Mr. David G. Young from Ms. Pamela Sue Young nee McIntyre did not constitute an agreement involving an exchange of each parties rights and obligations with respect to the property or equitable conversion.

2. The lower court erred in holding that the Property Settlement Agreement Adopted by the final order in the divorce of Mr. David G. Young from Ms. Pamela Sue Young nee McIntyre did not sever the joint tenancy clause of the deed of conveyance to Mr. David G. Young and Ms. Pamela Sue Young nee McIntyre.

VII. POINTS AND LEGAL AUTHORITIES

Cases

Statutes

VIII. DISCUSSION OF LAW

A. THE LOWER COURT ERRED IN HOLDING THAT THE PLAIN LANGUAGE OF THE FINAL ORDER IN THE DIVORCE OF MR. DAVID G. YOUNG FROM MS. PAMELA SUE YOUNG NEE MCINTYRE DID NOT CONSTITUTE AN AGREEMENT INVOLVING AN EXCHANGE OF EACH PARTIES RIGHTS AND OBLIGATIONS WITH RESPECT TO THE PROPERTY OR EQUITABLE CONVERSION.

Upon the separation of Mr. Young and Ms. McIntyre they entered into a property settlement agreement where the parties agreed to sell the subject property and split the proceeds. This contractual relationship was adopted by the Court in the final Divorce Order dated November 8, 2005. By terms of the final Order Mr. Young was given exclusive possession of the property. The parties agreed to make repairs and were required to list and sale the property. The parties had a right to enforce their rights under the Property Settlement Agreement including the listing on sale of the property.

Mr. Young took exclusive possession of the property and began repairs on the property prior to his death on July 31, 2006.

West Virginia Code § 36-1-19 repealed and abolished the common law rule of joint tenancies and tenancy by the entireties.

By enactment of West Virginia Code § 36-1-20, the Legislature of the State of West Virginia created the statutory right of joint tenancy by saying in subsection

> (a) the preceding Section (36-1-19) shall not apply to any estate which joint tenants have as executors or trustees, nor to an estate conveyed or devised to a person in their own right, when it manifestly appears from the tenor of the instrument that it was intended that the part of the one dying should then belong to the other. Neither shall it effect the mode of proceeding on any joint judgment or decree in favor of, or on the contract with two or more, if one of them dies.

The Court found that there is a strong statutory presumption in favor of construing

joint tenancies as tenancies in common without the right of survivorship. However, the presumption could be overcome by a clear and convincing showing that the intention of the parties to create a joint tenancy with rights of survivorship, Lieving v. Hadley, 188 W. Va. 197, 423 S.E.2d 600 (1992).

The parties entered into a property settlement agreement dated October 24, 2005, where they agreed to repair the real estate, list it, sell it, and split the proceeds when sold. Entering into the property settlement agreement, the parties made an equitable conversion of the real estate, entitling each to a one-half interest in the economic value of the property. As set forth by the Supreme Court of Appeals in Timberlake v. Heflin, 180 W. Va. 644, 379 S.E.2d 149 (1989). "When a contract to sell is made, the document of equitable conversion comes into play." The effect of the document was set forth in Maudru v. Humphreys, 83 W.Va. 307, 310-11, 98 S.E. 259, 260 (1919).

The property settlement agreement did create a valid agreement to sell the property. It is conceded that there is not a specific purchaser identified in the Agreement but clearly the parties where contractual, obligated to repair the home and sale the property. The parties did contract to sell the property. They did agree to fix the property and split the costs up to $5,000, and agreed to a split of the economic value.

Clearly it was, the intent of the parties to liquidate the marital estate and disburse the funds equally. The happenstance of the death of Mr. David G. Young should not operate as a windfall to the Defendant and leave Mr. Andrew Young (the sole heir of Mr. David G. Young) without any interest in the real estate.

This Court has not decided the effect of a divorce and property settlement agreement upon the questions of the survival of the joint tenancy or of the equitable conversion

of the interest. However other courts that have ruled on the issue of survival of the tenancy have looked at the intent of the parties Estate of Blair, 244 Cal. Rptr. 627, 632 n.3 (Cal. Ct. App. 1988)(describing it as unlikely that either spouse would desire "to make the macabre gamble" of being the survivor if one party died pending dissolution. Other jurisdictions have found that the express intent of the parties should control and replace the historical unity rule and to allow the joint tenants to continue would be directly opposite of the intent of the deceased party. Mamalis v. Bornovas, 297 A.2d 660, 663 (N.H. 1972) and Mann v. Bradley, 535 P.2d 213, 214 (Colo. 1975).

It is illogical to believe it was the intent of Mr. David G. Young to maintain the joint tenancy of the property and allow a windfall to his ex-wife. Many jurisdictions have followed this reasoning in severing the tenancy. Wardlow v. Pozzi, 338 P.2d 564, 566 (Cal. Ct. App. 1959)("hard to see how two persons in domestic difficulties, and desirous of settling their domestic problems" would desire continuation of joint tenancy), Rich v. Silver, 37 Cal. Rptr. 749, 751 (Cal. Ct. App. 1964) Guilbeault v. St. Amand, No. 93569, 1993 WL 392943 at *5 (Conn. Super. Sept. 28, 1993)(concluding that severance found when "the conduct of the parties voluntarily evidenced their intention to sever the joint tenancy with the right of survivorship and hold their property as tenants in common"); In re Marriage of Dowty, 496 N.E.2d 1252, 1254 (Ill. App. Ct. 1986)(finding that trial testimony at divorce evidenced intent to sever because parties desired to sell and divide proceeds "as soon as reasonably possible"); Brodzinsky v. Pulek, 182 A.2d 149, 156 (N.J. Super. 1962)(finding severance where joint tenants "by their conduct and course of dealing, mutually treated the subject mortgages as held by them as tenants in common"). See, e.g., Robertson v. U. S., 281 F. Supp. 955, 961 (N.D. Ala. 1968)(holding that joint tenancy in securities held by brothers "severed, terminated or abandoned ... either by the

agreement of the brother or by their conduct in devoting such securities to the partnership business"); Guilbeault v. St. Amand, No. 93569, 1993 WL 392943 at *5 (Conn. Super. Sept. 28, 1993)(concluding that severance found when "the conduct of the parties voluntarily evidenced their intention to sever the joint tenancy with the right of survivorship and hold their property as tenants in common"); In re Marriage of Dowty, 496 N.E.2d 1252, 1254 (Ill. App. Ct. 1986)(finding that trial testimony at divorce evidenced intent to sever because parties desired to sell and divide proceeds "as soon as reasonably possible"); Brodzinsky v. Pulek, 182 A.2d 149, 156 (N.J. Super. 1962)(finding severance where joint tenants "by their conduct and course of dealing, mutually treated the subject mortgages as held by them as tenants in common"). Compare In re Estate of Layton, 52 Cal. Rptr. 2d 251, 255-56 (Cal. Ct. App. 1996)(holding intent not to sever inferred from long delay and having filed a motion to sell property but not having proceeded with motion).

In the present actions it was the clear intent of the parties to sell the real property and divide the economic value.

B. THE LOWER COURT ERRED IN HOLDING THAT THE PROPERTY SETTLEMENT AGREEMENT ADOPTED BY FINAL ORDER IN THE DIVORCE OF MR. DAVID G. YOUNG FROM MS. PAMELA SUE YOUNG NEE MCINTYRE DID NOT SEVERE THE JOINT TENANCY CLAUSE OF THE DEED OF CONVEYANCE TO MR. DAVID G. YOUNG AND MS. PAMELA SUE YOUNG NEE MCINTYRE.

The Court set forth in Herring v. Carrol, 171 W. Va. 516, 300 S.E.2d 629 (1983), that the four unities that are required to create joint tenancy in real estate are (1) each party's undivided interest must vest at the same time, (2) each party must receive an undivided interest in the whole, (3) each party's possession must be co-equal so that his property interest is the same as to the legal estate and duration, and (4) each party must receive his interest in the same title document. The Final Divorce Order broke the unity of possession.

The parties no longer have co-equal possession in the property and the same as to the legal estate and duration. Mr. David G. Young was given exclusive possession of the property to the express exclusion of the Defendant. The Defendant only retained legal title and not a possessionary interest.

This Court has not ruled on the issue of the effect of a divorce decree on the unity of possession where one party is awarded exclusive possession. Several courts have found that a divorce decree by itself destroyed the unity of possession and thus, caused a severance, Carson v. Ellis 349 P 2d 807 (Kan 1960).. In re Estate of Estelle, 593 P.2d 663, 665 (Ariz. 1979); see also Estate of Seibert, 276 Cal. Rptr. 508, 510 (Cal. Ct. App. 1990)(assuming that divorce agreement for sale breached one of the four unities and identifying the right of survivorship as one of those unities); Gaskie v. Hugins, 640 P.2d 248, 249 (Colo. Ct. App. 1981); see also In re Estate of Gebert, 157 Cal. Rptr. 46, 47 (Cal. Ct. App. 1979); In re Estate of Asvitt, 154 Cal. Rptr. 713 (Cal. Ct. App. 1979); Estate of Dompke v. Dompke, 542 N.E.2d 1222 (Ill. App. Ct. 1989); In re Estate of Coleman, 395 N.E.2d 1209 (Ill. App. Ct. 1979); In re Estate of Bates, 492 N.W.2d 704, 707 (Iowa Ct. App. 1992); Leutgers v. Kasten, 204 N.W.2d 210 (Minn. 1973); Waxler v. Dalsted, 529 N.W.2d 176 (N.D. 1995); In re Estate of Steffen, 467 N.W.2d 490 (S.D. 1991).

Severance of a joint tenancy can be accomplished by an agreement of the parties to it, even if the unities themselves are not broken. The parties to the agreement will then hold as tenants in common. As long as such an express agreement is sufficient, it is open to joint tenants to end the *ius accrescendi* by the kinds of agreements commonly made in divorce cases. Other jurisdictions have found such agreements to sever joint tenancies in divorce cases from language that is ambiguous at best, and sometimes even from the conduct of the parties. They have not required an express agreement to sever. Any action on the couple's part that is inconsistent with

an intent to continue the joint tenancy sometimes can serve as a substitute for an actual agreement. .Guilbeault v. St. Amand, *No. 93569, 1993 WL 392943* at *5 (Conn. Super. Sept. 28, 1993)(concluding that severance found when "the conduct of the parties voluntarily evidenced their intention to sever the joint tenancy with the right of survivorship and hold their property as tenants in common"); In re Marriage of Dowty, 496 N.E.2d 1252, 1254 (Ill. App. Ct. 1986)(finding that trial testimony at divorce evidenced intent to sever because parties desired to sell and divide proceeds "as soon as reasonably possible"); Brodzinsky v. Pulek, 182 A.2d 149, 156 (N.J. Super. 1962)(finding severance where joint tenants "by their conduct and course of dealing, mutually treated the subject mortgages as held by them as tenants in common").

IX. PRAYER FOR RELIEF

WHEREFORE, based upon the evidence in the record and the authorities cited herein, the Plaintiff/Appellant respectfully submit that the Final Order is in error, and as such, this Petition appealing the same should be granted, the Final Order should be reversed, and that an order entered granting the Plaintiffs Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I, Floyd M. Sayre, III, Esquire, do hereby certify that a true and exact copy of the foregoing *Brief* has been served, by United States mail, postage prepaid, upon the following:

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Date: April 2, 2008

Floyd M. Sayre, III